IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-56

IN THE MATTER OF EDNA SMITH,

Appellant.

ON APPEAL FROM THE
SUPREME COURT OF THE
STATE OF SOUTH CAROLINA

REPLY TO MOTION TO DISMISS OR AFFIRM

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I. The Disciplinary Rules, as Construed, Are Vague and Overbroad.

Each of the disciplinary rules at issue defines a violation in its initial sentence; then, the subsections define exempt situations in which conduct otherwise proscribed is permitted.[1] Neither the appellant nor anyone else could have had notice that these subsections, on their face limiting the scope of the rule, would be held to extend the application of the rule to conduct not otherwise proscribed.[2]

In any event, the rules as construed are overbroad. For example, the State interprets DR 2-103(D) to prohibit an attorney from allowing any non-exempt organization to promote the services of his associates,[1] and also from offering the services of any organization to which he belongs for a possible class action.[2] According to the State's interpretation (not clearly stated by the court below), the referral of a pro bono case is "promotion" of an attorney's services. Therefore, since the state court found that the ACLU is not an exempt organization, any attorney who accepts a pro bono case referred by the ACLU has violated the rule; and any attorney who belongs to the ACLU cannot offer the services of the ACLU to any member of any plaintiff class.

According to the State, "the rules involved herein do not ... prevent an attorney from advising citizens of their rights and of the availability of counsel."[3] But that is all Edna Smith did to be disciplined. Appellant advised Mrs. Williams in July, 1973, of her legal rights, and later advised her that the ACLU was interested in making counsel available to her.

The State proposes a most novel defense of its position -- that when the letter was written "[t]he aggrieved party was aware of her legal rights and of means of access to the courts..." Ibid. The State's position

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1. The subsections are prefaced, in DR 2-103(D) by "However, he may...," and in DR 2-104(A) by "except that...."

2. The court applied one rule in any unforeseeable way by construing DR 2-104(A)(5) to create a violation for offering the assistance of an organization to any member of any plaintiff class, even though the rule requires on its face that "success in asserting rights or defenses of his client in litigation in the nature of a class action [be] dependent upon the joinder of others" (appellant had no client, and, in any event, success would not have depended upon joinder).

1. Motion to Dismiss or Affirm, 10. The language of the rule is "assist," not "allow."

2. Ibid., 16.

3. Ibid., 14.

appears to be that when an attorney follows the dictates of Canon 2, the attorney must first ascertain that the individual is ignorant of his or her rights. The State again inserts an element of the charge which the rule's language and the record do not support.

The letter which is the basis of the charge advised Mrs. Williams that the ACLU would be interested in bringing a lawsuit. This was new information as to the availability of counsel. While the State repeatedly claims that the women at the meeting were there advised that the ACLU was available to represent them, Motion to Dismiss or Affirm, 3, 5-6, 7, n. 8, and 8, this is of whole cloth. Mrs. Williams, the State's only witness, never mentioned the ACLU in forty-four (44) pages of testimony.[1]

Appellant testified that she told the individuals at the meeting that she was an attorney but she could not recall whether or not she mentioned her association with the

1. Mrs. Williams twice changed her testimony when asked if appellant had offered to be her attorney. TR. 7, 17, 26, 35. From this, and the incorrect assertion that appellant had offered the assistance of the ACLU at the meeting, the State interprets the August 30, 1973, letter as a reiteration that appellant would be Mrs. Williams' ACLU attorney. Motion to Dismiss or Affirm, 7, n. 8.

ACLU. TR. 63. She said she did not offer to represent anyone at the meeting, ibid., and that while she discussed the ACLU with Gary Allen at the meeting, this was in a conversation with him and she was not certain if others in the room heard this. TR. 96. Her testimony was explicit that she did not know at the time of the meeting that the ACLU would support possible litigation, ibid., so an offer would hardly have been likely, despite the fact that no testimony exists that the assistance of ACLU was then offered.[1]

1. The tribunals below made no finding that Mrs. Williams was fully aware of her rights and the availability of counsel after the July meeting. Mrs. Williams, with a ninth grade education, TR. 12, 42, whose testimony evidenced a lack of stability, a condition which the record otherwise reflects, TR. 159, 14-15, was, in the view of the State, fully apprised of her legal situation after one meeting. The Code of Professional Responsibility's Ethical Considerations acknowledge that an attorney's responsibility may vary according to the intelligence, experience and mental condition of the client. See EC 7-11. Appellant's letter refutes the stated position for appellant wrote that she "would like to explain what is involved so you can understand what is going on." Jurisdictional Statement Appendix, 25a. It ill behooves the State to make this argument de hors the record, for its objection stopped appellant from testifying as to her observation of the meeting participants' understanding of their rights. TR. 70-72.

Significantly, the State's defense of this disciplinary action is based upon an inaccurate statement of the facts. The first time appellant met Mrs. Williams (the person allegedly "solicited") was at a meeting arranged by Gary Allen, not by appellant,[1] and Mr. Allen (an old family friend, TR. 37) invited Mrs. Williams and her grandmother to come to the meeting. Mrs. Williams came voluntarily, and she knew before she came that the meeting was for her to obtain legal advice.[2] At that meeting, appellant simply answered questions asked about the legal rights and remedies of women compelled to accept sterilization as a condition of receiving government Medicaid services. Appellant had not previously discussed the situation with the ACLU and she did not then advise anyone to write to the ACLU for

1. Contrary to Motion to Dismiss or Affirm, 2, Gary Allen called the South Carolina Council on Human Rights about the situation. TR. 141. That office asked appellant to investigate and to call Gary Allen who would arrange a meeting. TR. 59-60, 152-53.

2. TR. 151, 16-17. Appellant definitely does challenge the assertion that the initial advice was "unsolicited," contrary to the Motion to Dismiss or Affirm, 6.

assistance.[1] Appellant later received a request from Gary Allen to write to Mrs. Williams, and she did so. One meeting and one letter were the only contacts appellant had with Mrs. Williams before she advised appellant that she did not wish to bring suit.[2] There was only an offer of legal assistance (not pursued when declined) to help redress an abuse perceived to exist in a government program. This case quite simply does not involve solicitation "at the hospital room or the accident site, or in any other situation that breeds undue influence." Bates v. State Bar of Arizona, ___ U.S. ___, 97 S.Ct. 2691, 2700 (1977).[3]

1. See, supra, 3-4.

2. Mrs. Williams alleged that she was pestered by persons other than appellant, names unspecified. Appellant and Mrs. Williams first met at the meeting, where the latter mentioned her child's condition. TR. 17. She testified that appellant "did not attempt to persuade or pressure me to file this lawsuit." TR. 26. There is no assertion that appellant knew the condition of Mrs. Williams' child in August.

3. In its motion, 8, n. 11, the State challenges the assertion that ethical strictures against solicitation received little enforcement prior to the issuance of the complaint herein. However, the cases misleadingly cited "e.g." are all the instances of public enforcement against solicitation in South Carolina; in the entire history of the state there were only three reported cases prior to the issuance of this complaint.

II. The State Misinterprets NAACP v. Button, 371 U.S. 415 (1963) and its Progeny, and Misrepresents the Record.

The State employs an exceedingly narrow view of the first amendment, a view which this Court has repeatedly rejected. In furtherance of its argument, the State misrepresents the record.

The State disposes of "the 'union cases'"[1] by the simply assertion that "the aggrieved party was not a member of the ACLU..." Motion to Dismiss or Affirm, 13. The fact that NAACP v. Button, 371 U.S. 415 (1963), involved advising nonmembers of the NAACP does not deter the State.

But NAACP v. Button 371 U.S. 415 (1963), remains a problem for the State. It sets up false distinctions. First it claims Button was based on the "political" rights involved. To the contrary, this Court clearly said that this was not critical, and held the statutes

1. Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964); United Mine Workers of America v. Illinois State Bar Association., 389 U.S. 217 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971).

unconstitutional of their face for infringement on the first amendment.[1] The State pays no heed to the subsequent cases of this Court which applied the first amendment to associational activities to advance monetary claims.

Additionally, the State falsely claims that Doe v. Pierce, (D.S.C. No. 74-475) "was not against government but against a private physician, ergo, private litigation and not political expression;..." Motion to Dismiss or Affirm, 15. But that suit sought damages and declaratory injunctive relief against the physician for acting under color of state law as a provider of Medicaid services -- a state and federal program. Other defendants were the county hospital and certain of its officials, and the state and county directors of social services.[2]

In footnote 27 of their motion, the State also multiplies ten fold the amount of damages sought, and claims the August 30, 1973, letter emphasized money. Money is mentioned once, and the letter also states,

1. The State suggests Button is inapposite because Virginia had amended its statutes to threaten the NAACP. Motion to Dismiss or Affirm, 14. But Button said that even the predating American Bar Association Canons of Ethics could not justify the infringement on first amendment rights. 371 U.S. 425-26, 444-45.

2. The State has been represented in these proceedings by some of the same attorneys who represented the state and county social service directors in Doe v. Pierce.

"This practice must stop." Jurisdictional Statement, 25a. Mrs. Williams testified one of the main things discussed at the meeting was the right not to be pressured into sterilization. TR. 46.

The sterilization litigation was at its core an effort to correct a perceived abuse of rights by the state and federal government. It was not "oppressive, malicious, or avaricious use of the legal process" nor "an object of general competition among [South Carolina] lawyers." 371 U.S. at 443.

No attorney could profit financially from representing Mrs. Williams for the ACLU; the only financial benefit was a speculative recovery of fees by the ACLU as an organization. That fees are now sought in civil rights cases is of no moment, for even in NAACP v. Button, 371 U.S. 415, 420 (1963), the staff attorneys were compensated for "solicited" cases. Therefore, the overbreadth analysis of Button is applicable.

III. The Lack of Notice and of Proof of All Facts Essential to Establish Violations of the Cited Rules Violated Due Process.

The State asserts that appellant had fair notice of the charges against her, but its brief establishes the contrary, quite convincingly. The State takes the position that, to be given fair notice of the charges, the person disciplined must be given "the facts upon which the claim of misconduct is founded."[1] But, a comparison of the complaint with the full statement of the necessary facts shows that this was not done below.

The State now describes the facts necessary in order to establish a defensible disciplinary violation as follows:[2]

> "... an attorney, who has previously given unsolicited advice to a layman of his legal rights and further has advised him of his means to effectuate his rights [is prohibited] from seeking that person (either for himself or for an organization to which he belongs and whose primary purpose includes the rendition of legal services) as a plaintiff in a class action against a private defendant for money damages."

1. Motion to Dismiss or Affirm, 17.
2. Ibid., 16.

The complaint herein simply charges appellant with "solicitation" and attached her letter. Neither in the complaint nor the letter are any of the following elements of the State's summary of the charge:

(1) That appellant previously gave unsolicited legal advice to Mrs. Williams;

(2) That appellant previously advised Mrs. Williams that practical means to effectuate her rights were in fact available;

(3) That the primary purpose of the ACLU is to render legal services;

(4) That the litigation was contemplated against Dr. Pierce in his private capacity; and

(5) That a class action was contemplated at the time of the letter dated August 30, 1973.

In fact, no evidence sustained the first four points,[1] and the only evidence that could establish the fifth point was appellant's own testimony obtained in fashion very similar to

1. The facts were that:
(1) Mrs. Williams solicited appellant's advice by voluntarily attending a meeting where she knew that she could ask about her legal rights;
(Footnote continued to next page.)

the procedure in In re Ruffalo, 390 U.S. 544 (1968), in that the testimony was obtained by interrogating plaintiff when she had never been formally advised by the Grievance Board that offering legal assistance to the possible plaintiff in a class action was culpable conduct with which she was charged.[1]

CONCLUSION

Appellant submits that the Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

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(Footnote continued from preceding page.)
(2) appellant did not know of any counsel available at the time of the July meeting;
(3) the ACLU's purpose is to protect civil liberties, by any appropriate lawful means, just as the NAACP uses litigation to further equal rights; and
(4) the litigation ultimately brought against Dr. Pierce named him as an agent of the State, acting under color of state law. See, supra, 8.

1. Indeed, the State never made any effort to establish this element. The only testimony bearing on this was six leading questions directed to appellant by a panel member, TR. 101-03, and the answer was that at the time of the letter appellant had no knowledge of whether or not there would be class action litigation.